RESPONSE REQUESTED

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No. 00-10666

Supreme Court, U.S.
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OCT 9 2001
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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM JOSEPH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

1. Whether, as a matter of statutory interpretation, brandishing a firearm is an element of an offense defined by 18 U.S.C. 924(c)(1)(A)(ii).

2. Whether the district court plainly erred by failing to rule that the Constitution requires any fact that increases a defendant's statutory mandatory minimum sentence to be proved at trial beyond a reasonable doubt.



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## OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 243 F.3d 806.

## JURISDICTION

The judgment of the court of appeals was entered on March 20, 2001. The petition for a writ of certiorari was filed on June 18, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a plea of guilty and a bench trial in the United States District Court for the Middle District of North Carolina,

petitioner was convicted of distributing marijuana, in violation of 21 U.S.C. 841(a), and of carrying a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to time served (two days' imprisonment) on the distribution count and to seven years' imprisonment on the firearm offense, to be followed by concurrent terms of three years' supervised release. He was also fined $3000, and ordered to pay a $200 special assessment. The court of appeals affirmed.

1. On April 29, 1999, an undercover law enforcement officer visited petitioner's pawn shop and bought an ounce of marijuana from petitioner. Pet. App. B, 2; Presentence Report (PSR) ¶ 5. The next day the officer returned and bought 114 grams (approximately four ounces) of marijuana. During both sales, petitioner carried a 9mm Taurus handgun in an unconcealed hip holster. At one point petitioner removed the gun from its holster and told the officer that the gun was illegal because of its high-capacity magazine, and that petitioner's homemade bullets could pierce a police officer's armored jacket. Pet. App. B, 2.

2. Petitioner was indicted on two counts of distribution of marijuana, in violation of 21 U.S.C. 841, and two counts of carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. B, 2. He pleaded guilty to one distribution charge, and the court found



him guilty of the associated firearm charge after a bench trial. Id. at 2-3. The other two counts were dismissed on the government's motion. Id. at 2.

The Presentence Report determined that for purposes of sentencing petitioner should be held responsible for the equivalent of 534 grams of marijuana, resulting in a base offense level of eight under the Sentencing Guidelines. PSR ¶ 12; see Guidelines § 2D1.1(c)(16).[1] With that offense level (the PSR recommended no adjustments) in criminal history category I, the PSR recommended a Guidelines sentencing range of 0-6 months' imprisonment on the distribution count. On the firearm count, Guidelines § 2K2.4(a)(2) specifies that the Guidelines sentence for an offense under Section 924(c) is "the minimum term of imprisonment required by statute," which the PSR indicated was seven years' imprisonment. PSR ¶ 41.

At sentencing, the government argued that petitioner should be held responsible for an additional 8-12 pounds of marijuana that the evidence suggested he had sold over a six-year period, but the district court found the evidence insufficient to support

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[1] The PSR related (¶¶ 4-10) that in addition to the 114 grams of marijuana involved in the offense of conviction, petitioner sold undercover officers an ounce (28 grams) of marijuana on April 28, 1999; another ounce on April 29; three and a half ounces of marijuana, one gram of opium, and two diazepam tablets on May 6; and a half ounce of marijuana and four grams of opium on May 18. The PSR converted the other drug quantities to marijuana-equivalents for purposes of its Guidelines calculations. PSR ¶ 12; see Guidelines § 2D1.1, comment., nn. 6, 10.

that attribution. See Sent. Tr. 26-30. The court also rejected petitioner's arguments that he should be subject to a five-year, rather than a seven-year, minimum sentence on the firearm count, both because his display of a firearm during and in relation to the drug offense did not amount to "brandish[ing]" within the meaning of Section 924(c)(1)(A)(ii), and because the government did not charge brandishing in the indictment or prove it beyond a reasonable doubt at trial. See Deft's Response to Govt's Position Concerning Sentencing Factors 3-9; Sent. Tr. 3-26. Having found that petitioner's display of the weapon met the definition of brandishing in 18 U.S.C. 924(c)(4), the court sentenced petitioner to "time served" (which the court deemed to be about two days' imprisonment) on the distribution count, and to seven years' imprisonment on the firearm count. Pet. App. A, 2; Sent. Tr. 41. The court also observed to counsel that it thought "the seven-year sentence [was] appropriate" on the facts of the case. Sent. Tr. 40. Although the court declined to specify that it would reimpose that sentence even if petitioner's argument concerning brandishing were to succeed on appeal, it made clear that if the case were remanded, the court would consider the overall sentence open for reconsideration. Id. at 38-40; see Pet. App. B, 5.

3. The court of appeals affirmed. Pet. App. B, 1-10. The court rejected (id. at 3-10) petitioner's renewed argument that,



as a matter of statutory construction, brandishing is an element of an aggravated offense defined by Section 924(c)(1)(A)(ii), which must therefore be charged in the indictment and proved at trial beyond a reasonable doubt before it may form the basis for a mandatory minimum sentence. The court also rejected (Pet. App. B, 4-6) the argument, raised in petitioner's reply brief and in a supplemental brief, that those procedural safeguards are constitutionally required under Apprendi v. New Jersey, 530 U.S. 466 (2000). The court observed (Pet. App. B, 4) that, because Section 924(c)(1) does not set a maximum penalty for any form of the offense of using or carrying a firearm during and in relation to a drug-trafficking offense, it involves only a mandatory minimum sentence, not a finding that "increases the penalty for a crime beyond [a] prescribed statutory maximum." Apprendi, 530 U.S. at 490. The court concluded that "the 'brandished' clause of [the statute] sets forth a sentencing factor that need not be charged in the indictment." Pet. App. B, 10. Because the brandishing provision "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm," the court concluded, that approach is constitutional under McMillan v. Pennsylvania, 477 U.S. 79 (1986). Pet. App. B, 4 (quoting McMillan, 477 U.S. at 87-88).

ARGUMENT

Petitioner argues principally (see Pet. i, 6-7, 12-20) that 18 U.S.C. 924(a)(1)(A), as amended in 1998 and presently in effect, is properly construed to define a base offense of using or carrying a firearm during and in relation to a drug trafficking offense (or a crime of violence), and separate, progressively aggravated offenses involving the additional elements of brandishing or discharge of the firearm. The four courts of appeals that have considered that argument have correctly rejected it. See Pet. App. B3-10; United States v. Gray, 260 F.3d 1267, 1280-1282 (11th Cir. 2001); United States v. Barton, 257 F.3d 433, 441-443 (5th Cir. 2001); United States v. Pounds, 230 F.3d 1317, 1319-1320 (11th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1631 (2001) (No. 00-8876); United States v. Carlson, 217 F.3d 986, 987-989 (8th Cir. 2000), cert. denied, 531 U.S. 1095 (2001) (No. 00-7069); see also United States v. Sandoval, 241 F.3d 549, 551-552 (7th Cir. 2001) (weapon type, under Section 924(c)(1)(B), is a sentencing factor), petition for cert. pending, No. 01-6076 (filed July 12, 2001). There is accordingly no need for this Court to review the issue.

Section 924(c)(1)(A) provides in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm * * * shall, in addition to the punishment provided for such crime of violence or drug trafficking crime --
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.



Thus, the statute begins with a principal paragraph laying out the elements of an offense, ending with "shall," and followed by three numbered subsections specifying applicable sentences. That structure on its face "suggest[s] that the numbered subsections are only sentencing provisions." Jones v. United States, 526 U.S. 227, 232 (1999) (considering similar structure of 18 U.S.C. 2119); see also Pounds, 230 F.3d at 1319; Carlson, 217 F.3d at 987.

As petitioner points out (Pet. 12-16), in Jones the Court ultimately concluded that the carjacking statute at issue there, 18 U.S.C. 2119, was best construed to define a base offense and two aggravated offenses. "Apart from their initial structural similarity, however, Section 924(c)(1) and Section 2119 differ in material respects that make a different conclusion appropriate here. The present version of Section 924(c)(1) also differs critically from the earlier version of that statute that this Court interpreted in Castillo v. United States, 530 U.S. 120 (2000), where the Court held that the type of firearm used or carried was an aggravating offense element. That version of the statute provided, in pertinent part, that:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall * * * be sentenced to imprisonment for five years, and if the firearm is a * * * machinegun, * * * to imprisonment for thirty years.

18 U.S.C. 924(c)(1) (Supp. V 1993).[2]

As the court of appeals recognized (Pet. App. B, 6), the most important difference between the current version of Section 924(c)(1) and either Section 2119 or the earlier Section 924(c) is that under that the present statute, the statutory maximum sentence does not depend at all on the presence or absence of an aggravating factor. Current Sections 924(c)(1)(A)(ii) (brandishing) and (iii) (discharge) provide that if the specified circumstances exist, the sentence imposed must be "not less than" a certain term of years. Those provisions accordingly impose

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[2] The court of appeals in this case noted (Pet. App. B, 6) that in United States v. Bandy, 239 F.3d 802, 807-808 (6th Cir. 2001), the Sixth Circuit appeared to hold that weapon type is an offense element under amended Section 924(c)(1)(B). Although the Bandy opinion purports to apply the amended statute (or, rather, seems to assume that the current version is the same as the one the Court interpreted in Castillo), the crime in that case was committed before the statute was amended in 1998. Bandy was therefore correct, on its facts, in applying Castillo and remanding the case for resentencing. The Sixth Circuit has not had an opportunity to reconsider the language of the Bandy opinion in a case that actually arose under the current version of the statute. In any event, because Bandy involved firearm type, which is now addressed by Section 924(c)(1)(B), rather than brandishing or discharge of a firearm, which is addressed by the somewhat different language of Section 924(c)(1)(A), any potential conflict caused by that decision would not warrant review in this case.



statutory minimum sentences, with an implicit maximum sentence of life imprisonment for any form of the offense.

Current Section 924(c) is also structurally very different from the earlier version construed in Castillo. In that case, the Court reasoned in part that "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up with dashes or separated into subsections." The Court noted, however, that the current version of the statute -- which was in place by the time the Court considered Castillo -- "separates different parts of the first sentence (and others) into different subsections," and it observed that the amendment was a "structural circumstance[] that [would] suggest a contrary interpretation" from the one the Court adopted with respect to the unamended language. 530 U.S. at 125.

Both Castillo and Jones also gave weight to the traditional treatment of a particular statutory factor. See Castillo, 530 U.S. at 126-127; Jones, 526 U.S. at 234-237. Although petitioner cites 11 state statutes, of various sorts, to support an argument that brandishing is a traditional offense element, see Pet. 15; Pet. App. F, his comparisons are considerably less compelling than those drawn by the Court in Jones, 526 U.S. at 235-236, between the carjacking statute and the federal robbery statutes

on which it had been modeled.[3] Moreover, Castillo already considered the specific factor and context at issue here, and explained that "[t]raditional sentencing factors often involve * * * special features of the manner in which a basic crime was carried out (e.g., that the defendant * * * brandished a gun)." 530 U.S. at 126 (citing Guidelines § 5K2.6 (authorizing upward departures for, among other things, discharge of a firearm)); see also McMillan v. Pennsylvania, 477 U.S. 79, 90-91 (1986) (suggesting that visible possession of a firearm has not historically been treated as an offense element); Pet. App. B, 10 (citing pertinent Guidelines provisions).[4]

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[3] The Jones Court also relied, to a lesser extent, on other federal statutes and on state robbery statutes. See 526 U.S. at 235, 236-237. We note that two of the state statutes that petitioner cites do not criminalize the brandishing of a firearm. See Cal. Penal Code § 246.1; Iowa Code § 723A.1.

[4] Petitioner notes (Pet. 7) that brandishing and discharge of a firearm, the enhancing factors specified in clauses (ii) and (iii) of Section 924(c)(1)(A), should presumably both be treated either as elements or as sentencing factors. He then argues (Pet. 15; Pet. App. D, E) that discharge is traditionally an element, and that Congress must accordingly have intended that brandishing be treated as an element. The opposite inference is more plausible: Because clause (i) is indisputably a sentencing provision, and clause (ii) specifies a traditional sentencing factor (brandishing), clause (iii) is likewise best read to deal only with sentencing. In any event, Castillo's reasoning that "brandish[ing] a gun" is best construed as an example of "the manner in which a basic crime [is] carried out" applies equally to discharge of a firearm. Moreover, in support of its observation that brandishing, as a manner of carrying out a crime, was a traditional sentencing factor, the Court cited (530 U.S. at 126) Guidelines § 5K2.6. That provision authorizes upward departures where a weapon was used or possessed in the commission of an offense, and it provides in particular that "[t]he discharge of a



The legislative history of the 1998 revisions to Section 924(c)(1)(A) also indicates that Congress expected factors such as brandishing to be taken into account at sentencing, rather than to figure into the threshold determination of criminal liability. The House of Representatives described the revised statute as "provid[ing] for increased mandatory minimum sentences[,]" H.R. 344, 105th Cong., 1st Sess. 1 (1997), "provid[ing] for an increased mandatory penalty for any person who possesses, brandishes, or discharges a firearm[,]" id. at 2, and "increas-[ing] penalties for escalating egregious conduct[,]" id. at 6. See Castillo, 530 U.S. at 129-130; Jones, 526 U.S. at 237-239; Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (considering legislative history).

Furthermore, unlike the statutes at issue in Jones and Castillo, Sections 924(c)(1)(A)(ii) and (iii) do not impose "steeply higher penalties[,]" Jones, 526 U.S. at 233, which might suggest that they were intended to define separate offenses. In Jones, the relevant maximum sentence increased from 15 years' imprisonment for any carjacking to 25 years if the crime resulted in serious injury, and to life if it resulted in death. In Castillo, the version of Section 924(c)(1) that was at issue -- which specified fixed sentences, rather than sentencing ranges -- doubled the applicable sentence from five years to ten years if

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firearm might warrant a substantial sentence increase."

the firearm used or carried was short-barreled, and raised it to 30 years if the firearm was a machinegun or was equipped with a silencer. See 530 U.S. at 127. Here, by contrast, a finding that a firearm was brandished increases the mandatory minimum penalty for a violation of the statute from five years to seven years, and a finding that the firearm was discharged increases the minimum to ten years. Furthermore, as explained above, neither finding has any effect on the statutory maximum sentence, which is life imprisonment for any form of the offense.[5]

Finally, petitioner suggests (Pet. 16) application of the principle of constitutional doubt that the Court invoked in Jones. That principle has no application where the proper interpretation of the statute is clear. See, e.g., United States v. Oakland Cannabis Buyers' Cooperative, 121 S. Ct. 1711, 1719 (2001). In any event, the constitutional question that was in

[5] Petitioner notes (Pet. 9-10) that the Sentencing Guidelines set the ordinary Guidelines sentence for a Section 924(c)(1)(A) violation at the applicable statutory minimum. He argues that, in practice, a finding that triggers an increased statutory minimum sentence is more likely to increase a defendant's actual prison time than a finding that increases the statutory maximum sentence. That argument is difficult to evaluate or refute in the abstract. In any event, neither the way the Sentencing Commission has chosen to exercise its discretion in establishing Guidelines applicable to Section 924(c) offenses, nor speculation about how often or how far district courts are likely to exercise their discretion to depart upward in such cases (see Guidelines § 2K2.4, Application Note 1), is germane to the threshold question of statutory interpretation here. Nothing in the Guidelines suggests (or could require) interpreting brandishing and discharge as anything other than statutory sentencing factors.



doubt in Jones was later resolved in Apprendi v. New Jersey, 530 U.S. 466 (2000). Cf. Pet. App. B, at 4 n.1 (Apprendi "obviate[s] the need for 'statutory interpretation'" where a fact increases the authorized punishment beyond the otherwise applicable statutory maximum). And, as discussed below, the constitutionality of the proper interpretation of Section 924(c)(1)(A), under which brandishing and discharge are sentencing factors rather than elements, is not doubtful under this Court's decision in McMillan v. Pennsylvania.

2. Relying primarily on Apprendi, petitioner also contends (Pet. 7-11) that the brandishing factor established by Section 924(c)(1)(A)(ii) should in any event be "treated like an element" of an aggravated offense. Pet. 7 (emphasis omitted). In Apprendi the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

In McMillan, this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. The Court reasoned

that such a sentencing scheme "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." Id. at 87-88.

Apprendi did not disturb the Court's holding in McMillan, although it made clear that that holding is limited "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." 530 U.S. at 487 n. 13. The court of appeals' reliance on McMillan to sustain petitioner's seven-year sentence, Pet. App. B, 4-6, is consistent with that limitation. Because Section 924(c)(1)(A) authorizes up to a life sentence for any violation, clause (iii)'s requirement that the court impose a seven-year sentence in specified circumstances does not "involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." Apprendi, 530 U.S. at 487 n. 13. Instead, as the court of appeals explained, that requirement, like the provision at issue in McMillan itself, "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." Pet.



App. B, 4 (quoting McMillan, 477 U.S. at 87-88 (alteration in the court of appeals' opinion)).

Since Apprendi, the courts of appeals have upheld the constitutionality of using sentencing factors that produce increased mandatory minimum sentences under 18 U.S.C. 924(c)(1). See Gray, 260 F.3d at 1281 (quoting Pounds, 230 F.3d at 1319-1320); Barton, 257 F.3d at 441 (plain-error review); United States v. Sandoval, 241 F.3d at 550-551 (firearm type) ("Apprendi is inapplicable here because convictions under § 924(c)(1)(A) [all] carry a statutory maximum sentence of life imprisonment[.]"); Pounds, 230 F.3d at 1319 & n. 1; Carlson, 217 F.3d at 988-989. The courts have also affirmed sentences imposed under the mandatory minimum sentencing provisions of 21 U.S.C. 841(b) based on a finding by the district court that triggered the minimum sentence, where the sentence imposed did not exceed the maximum authorized by statute given the findings made by the jury beyond a reasonable doubt. See, e.g., United States v. Barragan, No. 00-30335, 2001 WL 984681, at *5 (9th Cir. Aug. 29, 2001) (term of supervised release); United States v. Hitchcock, No. 00-10251, 2001 WL 951273, at *7 (9th Cir. Aug. 23, 2001); United States v. Rodgers, 245 F.3d 961, 965-968 (7th Cir. 2001), petition for cert. pending, No. 01-5169 (filed July 5, 2001); United States v. Robinson, 241 F.3d 115, 122 (1st Cir. 2001), cert. denied, No. 00-10411 (Oct. 1, 2001); United States v. Pratt, 239 F.3d 640, 646-648 (4th Cir.

2001) (term of supervised release); United States v. Williams, 238 F.3d 871, 877 (7th Cir.), cert. denied, 121 S. Ct. 2232 (2001) (No. 00-9667); United States v. McIntosh, 236 F.3d 968, 976 (8th Cir.), cert. denied, 121 S. Ct. 1964 (2001) (No. 00-1551); United States v. LaFreniere, 236 F.3d 41, 49-50 (1st Cir. 2001); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000), cert. denied, 121 S. Ct. 1163 (2001) (No. 00-8077); United States v. Aguayo-Delgado, 220 F.3d 926, 933-934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) (No. 00-6746).

The Sixth Circuit has taken a somewhat different approach in reviewing sentences imposed under Section 841(b). As petitioner points out (Pet. 8), in United States v. Ramirez, 242 F.3d 348, 351-352 (6th Cir. 2001), that court vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A) and remanded for resentencing, even though the original sentence did not exceed the maximum of 30 years authorized by Section 841(b)(1)(C) for a recidivist defendant. Post-Ramirez decisions of the Sixth Circuit make clear, however, that the court recognizes the continuing authority of McMillan in cases -- such as this one -- in which a factor limits the court's sentencing discretion within the range otherwise available, without altering the maximum available penalty or creating a separate offense.[6]

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[6] See United States v. Stafford, 258 F.3d 465, 478-479 & n.9 (6th Cir. 2001) (noting limitations of Ramirez line of cases); United States v. Garcia, 252 F.3d 838, 842-844 (6th Cir. 2001) ("Apprendi explicitly applies only in those situations where a factual determination made under a lesser standard of proof than the reasonable doubt standard 'increased the penalty for a crime beyond the [prescribed] statutory maximum.'") (quoting Apprendi, 530 U.S. at 490, and distinguishing Ramirez); United States v. Strayhorn, 250 F.3d 462, 470 (6th Cir. 2001).



Thus, although Ramirez contains broad language that could be read to apply to a statute such as Section 924(c)(1)(A), see 242 F.3d at 351 ("Aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved."), the holding of the case has been limited to the context of the laddered penalty provisions of Section 841(b). Under that provision, a drug-quantity determination made by the district court can be seen as simultaneously raising both the statutory minimum and the theoretical statutory maximum sentence for a particular defendant. Because Section 924(c)(1)(A), unlike Section 841, does not set forth graduated maximum penalties, but instead authorizes a life sentence for any offense, nothing in the decision below contradicts that holding, or implicates the narrow circuit conflict created by the Ramirez line of cases. Compare United States v. Alvarez, Nos. 00-1285 & 00-1286, 2001 WL 1141452, at *9 (6th Cir. Sept. 28, 2001) (despite Ramirez, Apprendi is "inapplicable" where "the statutory penalties available * * * include imprisonment for life").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2001

IN THE SUPREME COURT OF THE UNITED STATES

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| HARRIS, WILLIAM JOSEPH<br>Petitioner | ) | |
| vs. | ) | No. 00-10666 |
| USA | ) | |

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by Federal Express, on this 9th day of October 2001.

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